

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division**

DIANE S. BUTLER,

Plaintiff,

v.

CIVIL ACTION NO. 2:19cv673

KROGER LIMITED PARTNERSHIP I,

Defendant.

ORDER

This matter comes before the court on Defendant's, Kroger Limited Partnership I ("Kroger"), Motion for Summary Judgment, ECF No. 15, and Plaintiff's, Diane S. Butler ("Butler"), Motion for Imposition of Sanctions against Defendant of Default Judgment, or, Alternatively, an Adverse Inference Instruction Due to Spoliation of Evidence and Intentional Concealment of Same. ECF No. 31.

On July 16, 2020, the matter of the Motion for Summary Judgment was referred to United States Magistrate Judge Lawrence R. Leonard, ECF No. 20, and on September 4, 2020, the matter of the Motion for Imposition of Sanctions was referred to United States Magistrate Judge Lawrence R. Leonard, ECF No. 38, pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Federal Rule of Civil Procedure 72(b), to conduct necessary hearings, including evidentiary hearings, if necessary, and to submit to the undersigned district judge proposed findings of

fact, if applicable, and recommendations for the disposition of Kroger's Motion for Summary Judgment and Butler's Motion for Imposition of Sanctions. Two remote proceedings were held on October 15, 2020, and October 27, 2020. ECF Nos. 57, 58.

The Magistrate Judge's Report and Recommendation ("R&R"), which recommended denying Kroger's Motion for Summary Judgment, and granting in part Butler's Motion for Imposition of Sanctions, was filed on November 30, 2020. ECF No. 59. In the R&R, the parties were advised of their right to file written objections to the findings and recommendations made by the Magistrate Judge within fourteen (14) days from the date of the mailing of the R&R to the objecting party. Id. at 43-44. No Objections have been filed.

Having reviewed the record in its entirety, the court hereby **ADOPTS AND APPROVES IN FULL** the findings and recommendations set forth in the Magistrate Judge's thorough and well-reasoned R&R, ECF No. 59, filed on November 30, 2020. Accordingly, Kroger's Motion for Summary Judgment is **DENIED**, and Butler's Motion for Imposition of Sanctions is **GRANTED IN PART**. Kroger is sanctioned as follows:

(1) Kroger's motion for summary judgment is denied regarding its defenses alleging no proximate cause, no breach of duty, and contributory negligence based on open and obvious hazard.

(2) The jury shall be instructed that there was video of Butler's slip and fall but that Kroger lost it, and both parties are permitted to present evidence and argument regarding Kroger's failure to preserve the video evidence.

(3) Kroger is precluded from eliciting testimony from Vernon Harris claiming that the video did not show what caused Butler to slip and fall.

The Clerk is **DIRECTED** to send a copy of this Order to counsel for all parties.

IT IS SO ORDERED.

/s/ [Signature]
Rebecca Beach Smith
Senior United States District Judge

REBECCA BEACH SMITH
SENIOR UNITED STATES DISTRICT JUDGE

December 18 , 2020